Appeal No. 04-3510

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Qwest Corporation, a Colorado corporation,

Plaintiff-Appellee,

vs.

Minnesota Public Utilities Commission, et al.,

Defendants-Appellants,

CLEC Coalition; and AT&T Communications of the Midwest Inc.,

Intervenors-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Hon. Ann D. Montgomery, US District Court Judge

**JOINT BRIEF OF INTERVENORS-APPELLANTS
AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND THE CLEC COALITION**

BRIGGS AND MORGAN, P.A.
Mark J. Ayotte (#166315)
Thomas Erik Bailey (#236871)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 977-8670
Facsimile: (612) 977-8650

Attorneys for Intervenor-Appellant AT&T Communications of the Midwest, Inc.

MOSS & BARNETT, P.A.
Dan Lipschultz (#0168440)

4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612-347-0306
Facsimile: 612-339-6686

Attorneys for Intervenor-Appellant CLEC Coalition– US Link, Inc., NorthStar Access, LLC, Otter Tail Telcom, LLC, and 702 Communications

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The issue presented on appeal is whether the Minnesota Public Utilities Commission's ("MPUC" or "Commission") has authority under state law to order remedial payments to Competitive Local Exchange Carriers (CLECs) to rectify the harm caused by Qwest offering unlawfully secret rate discounts to select Minnesota CLECs in violation of state anti-discrimination laws. Under Minnesota law, the Commission's implied authority must be fairly drawn and evident from the agency's express statutory powers. And where the Minnesota Supreme Court has not clearly spoken on the Commission's authority under the statute at issue, as is the case here, Eighth Circuit law requires the District Court to rule according to how it believes the state supreme court would decide the matter, after considering relevant state precedent, analogous decisions, considered dicta, and any other reliable data. Here, the District Court relied on an inapposite Minnesota Court of Appeals decision that it mistakenly interpreted to hold that the Commission has no authority to provide any sort of equitable relief, while ignoring relevant Minnesota Supreme Court and Court of Appeals decisions that support the conclusion that the Commission has the implied authority to order remedial payments to CLECs to rectify the discriminatory harm in this case. Given the importance of the issue, Appellant CLECs ask that they be allowed 15 minutes of oral argument on this issue.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 28(a)(1), Intervenors-Appellants AT&T Communications of the Midwest, Inc. ("AT&T Midwest") and the CLEC Coalition (US Link, Inc., NorthStar Access, LLC, Otter Tail Telcom, LLC, and 702 Communications) (collectively, "Intervenor CLECs"), provide the following corporate disclosure statements:

- AT&T Midwest states that it is a wholly-owned subsidiary of AT&T Corp., a publicly held corporation. No publicly held company owns ten percent or more of the stock of AT&T Corp.
- NorthStar Access, LLC states that it is wholly owned by Sherburne Tele-Systems, Inc. Sherburne Tele-Systems is not a publicly held corporation.
- Otter Tail Telcom, LLC states that it is wholly owned by Park Region Telephone Company and Rothsay Telephone Co. Inc., neither of which is a publicly held corporation.
- US Link, Inc. states that it is wholly owned by TDS Telecommunications Corporation, which in turn is wholly owned by Telephone and Data Systems, Inc. Telephone and Data Systems, Inc. is a publicly held corporation.

- VAL-ED Joint Venture, LLP d/b/a 702 Communications states that it is a joint venture owned by Loretel Systems, Inc., East Otter Tail Telephone Company, Ottercom, LLC, Rothsay Telephone Company, Barnesville Municipal Telephone Company, and Red River Technologies, LLC. East Otter Tail Telephone and Rothsay Telephone companies are not publicly held corporations. Barnesville is a municipal corporation. Ottercom and Red River are subsets of cooperatives. Loretel Systems, Inc. is wholly owned by Hector Communications Corporation, which is publicly held.

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JURISDICTIONAL STATEMENT

The claims below arise under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. §§ 151-et seq., and the United States Constitution. The District Court properly exercised jurisdiction over the federal claims pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The District Court properly exercised jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367.

This is an appeal from the District Court's Memorandum Opinion and Order, dated August 25, 2004, granting in part and denying in part Plaintiff-Appellee Qwest's Motion for Judicial Relief, Declaratory Relief and Injunctive Relief. Judgment was entered August 26, 2004. This Court has jurisdiction to review final orders pursuant to 28 U.S.C. § 1291. The Minnesota Public Utilities Commission timely filed its appeal on September 17, 2005. Fed R. App. P. 4(a)(1)(A). AT&T Midwest and the CLEC Coalition each timely filed its Notice of Appeal on September 30, 2005. Fed. R. App. P. 4(a)(3).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

After ruling that the Minnesota Public Utilities Commission properly found that Qwest had knowingly and intentionally violated state anti-discrimination laws by offering secret business discounts to select Minnesota CLECs, did the district court err in ruling that the Commission could not exercise the remedial authority granted to it under state law to order Qwest to offer those same discounts to all Minnesota CLECs?

Apposite Authority:

- Minn. Stat. § 237.081, subd. 4
- *David v. Tanksley*, 218 F.3d 928 (8th Cir. 2000)
- *Peoples Natural Gas Co. v. Minnesota Pub. Utils. Comm'n*, 369 N.W.2d 530 (Minn. 1985)
- *In the Matter of the Application of Minnegasco*, 565 N.W2d 706 (Minn. 1997)
- *In re the Members of MIPA*, Appeal No. C0-97-606, 1997 WL 793132 (Minn. Ct. App. Dec. 30, 1997)

STATEMENT OF THE CASE

With the Telecommunications Act of 1996 ("Act"), Congress established a new regulatory framework intended to transform local telecommunications markets dominated by a single monopoly carrier into markets in which multiple carriers would compete for customers. The Minnesota Legislature established a very similar pro-competitive framework in 1995. The federal and state frameworks both rest on a foundation of laws that require incumbent local exchange carriers ("ILECs") such as Qwest to make their legacy networks available to competitive local exchange carriers ("CLECs" or "wholesale customers") such as the Intervenors on a reasonable and nondiscriminatory basis. Therefore, CLECs not only compete with Qwest, but also purchase services and facilities as Qwest's wholesale customers.

To give practical effect to the goal of open and nondiscriminatory access to local markets, Congress required ILECs to memorialize the terms of access and interconnection with each CLEC in what are generally called "interconnection agreements." To ensure that these terms are lawful, reasonable, and nondiscriminatory, ILECs must file these interconnection agreements with the relevant state public utilities commission for approval under 47 U.S.C. § 252(e). To further ensure nondiscriminatory access, ILECs must make available the rates, terms, and conditions of any interconnection agreement approved by a state commission to all other CLECs under 47 U.S.C. § 252(i).

After an exhaustive investigation by the Minnesota Department of Commerce ("DOC" or "Department"), and a seven-month contested case proceeding conducted by an Administrative Law Judge (ALJ), the Minnesota Public Utilities Commission ("MPUC" or "Commission") found that Qwest had knowingly and intentionally violated its obligation to file interconnection agreements it had entered into with select CLECs. The Commission and ALJ also found that Qwest had knowingly and intentionally discriminated against those CLECs that were not parties to the secret unfiled agreements by providing more favorable terms only to the CLECs with the secret deals. As a result, the Commission ordered Qwest to pay a penalty in the amount of $25.95 million pursuant to Minn. Stat. § 237.462, and to make remedial payments to CLECs roughly equivalent to what the CLECs would have received had Qwest given them the same price discounts and credits that Qwest provided to the "favored" CLECs with which it had entered into the secret agreements.

Qwest appealed the Commission's orders to the U.S. District Court of Minnesota, the Honorable Ann D. Montgomery presiding, claiming that the fine and remedial payments violated federal and state law. Judge Montgomery found that the Commission's decision to impose a $25.95 million fine was authorized by both state and federal law. The court found, however, that the Commission did not have authority under state law to order Qwest to make remedial payments to the CLECs harmed by Qwest's illegal actions.

All parties below appealed the district court's order. The Commission and the Intervenor CLECs appealed the ruling that the Commission was not authorized under state law to order the remedial payments to CLECs. Qwest appealed the ruling that the Commission was authorized under state and federal law to impose the $25.95 million fine.

STATEMENT OF FACTS

A. The Department Filed a Complaint Alleging Qwest Discriminated Against CLECs by Entering Into Interconnection Agreements Providing Certain CLECs With Beneficial Terms That Qwest Failed to Make Available To All CLECs.

On February 14, 2002, the Department filed a complaint with the Commission against Qwest, alleging that the ILEC had entered into secret interconnection agreements with certain CLECs and failed to file those agreements for Commission review and approval as required under 47 U.S.C. §§ 252(a) and 252(e) of the Act.[1] *See* Second Amended Verified Complaint, Joint Appellants' Appendix ("JAA") at JAA 23-25, ¶¶ 14-26.[2] Under the Act, ILECs are required to enter into interconnection agreements with any requesting CLEC on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. §§ 252(c)(1), (2), (3), (4) and (6). If the parties cannot agree to the terms of an interconnection agreement, they can submit the disputed terms for compulsory arbitration by the state commission. *Id.* at § 252(b). If the parties can agree to terms without arbitration, the interconnection agreement must be filed with the

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1 The Department amended its complaint twice. The first amendment removed the trade secret designations from the complaint because Qwest had re-designated the data as public, and the second amendment included a twelfth unfiled agreement that the Department had subsequently discovered between Qwest and McLeodUSA.

2 The Joint Appellants' Appendix was filed with the Commission's opening brief in this appeal.

state commission for review and approval. *Id.* at §§ 252(a)(1) and (e)(1). Such voluntary agreements may be rejected by the commission if any of their terms discriminate against a carrier that is not a party to the agreement, or the agreements are not consistent with the public interest, convenience, and necessity. *Id.* at § 252(e)(2). Once filed and approved, the terms of an ILEC's various interconnection agreements are available for any CLEC to incorporate into its interconnection agreement with the ILEC (commonly referred to as the "pick and choose" rule).[3] *Id.* at § 252(i).

In its complaint, the Department detailed the existence of 12 interconnection agreements that Qwest had entered into but had failed to file for Commission approval, so the terms were not available for pick and choose by other CLECs. JAA 25-46 at ¶¶ 27-260. The terms of the agreements dealt with the prices CLECs paid for network elements and services, the timing and quality of Qwest's provisioning of network elements and services, and the procedures to be followed to resolve disputes between the parties. *Id.* The Department alleged that Qwest's failure to make these terms available to all CLECs operating in Minnesota violated the filing and nondiscrimination requirements of both the Act and state law. JAA 46 at ¶ 261, JAA 49 at ¶¶ 280-82.

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[3] Just five months ago, in July 2004, the FCC eliminated the pick and choose rule. But the rule was in place and controlling law at all relevant times in this proceeding.

By order dated March 12, 2002, the Commission referred the Department's complaint to the Office of Administrative Hearings for an expedited proceeding under Minn. Stat. § 237.462. *See* Commission's Notice and Order for Hearing at JAA 73. The Commission directed the ALJ assigned to the matter to determine: 1) whether any portions of the agreements were required to be filed with the Commission; 2) whether portions that needed to be filed were filed under other settings; 3) whether there were any exculpatory reasons why an agreement that needed to be filed was not filed; and 4) whether disciplinary action or penalties were appropriate. *Id.* at JAA 74.

B. The ALJ Found 26 Interconnection Provisions in 12 Interconnection Agreements that Qwest Failed to File in Violation of the Act.

After the submission of pre-filed testimony, 5 days of hearings, and extensive briefing by the parties, the ALJ found that Qwest had failed to file 26 interconnection provisions contained in twelve interconnection agreements in violation of the Act. Findings of Fact, Conclusions, Recommendation and Memorandum, JAA 204 at ¶ 378. Six of the twelve unfiled agreements were with Eschelon Telecom Inc. ("Eschelon"), three were with McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), and one each with Covad Communications Company ("Covad"), USLink, Inc. ("USLink"), and a group of ten rural CLECs ("Small CLECs). JAA 164 at ¶ 37; JAA 168 at ¶ 78; JAA 169 at ¶ 89; JAA 173 at ¶ 119; JAA 176 at ¶ 151; JAA 179 at ¶ 168; JAA 186 at ¶ 232;

JAA 190 at ¶ 270; JAA 191 at ¶ 283; JAA 192 at ¶ 292; JAA 195 at ¶ 316; and JAA 199 at ¶ 348.

1. The Unfiled Eschelon/Qwest Interconnection Agreements.

In the unfiled Eschelon/Qwest agreements, Qwest agreed to a number of unfiled interconnection terms that were competitively advantageous to Eschelon. The principal provision was a 10% discount applied to all Eschelon purchases of Qwest network elements or services for a five-year period, found in Eschelon Agreement IV. JAA 173 at ¶¶ 124-25. This discount lowered the prices of all services and facilities purchased by Eschelon from Qwest, including those prices set by the Commission in lengthy cost docket proceedings. JAA 174 at ¶ 135. While the discount was purportedly in exchange for consulting services provided by Eschelon to Qwest, the evidence showed that the consulting agreement was in fact a "sham" designed to conceal the discount. JAA 173-74 at ¶¶ 126-30. Moreover, at the time Eschelon received the 10% discount, it agreed that it would not oppose Qwest's efforts to obtain Section 271 approval,[4] or file any complaint before any regulatory body concerning issues arising out the parties' interconnection agreements. JAA 201 at ¶ 361.

[4] Section 271 of the Act provides that a Regional Bell Operating Company like Qwest may enter the interLATA long distance business within its region upon showing that it has effectively opened up its region to local competition. This showing is made through application to the FCC, with state commissions providing recommendations on whether the application should be granted.

Qwest also agreed to give Eschelon a $13 credit per month per UNE-P line in connection with Qwest's failure to provide accurate daily usage information to use in billing interexchange carriers for switched access to the Eschelon network.[5] JAA 175 at ¶ 143. This credit lowered even further the cost to Eschelon for the UNE-P lines it purchased from Qwest. JAA 176 at ¶ 145. The credit was later increased to $16 per UNE-P line per month in Eschelon Agreement V. JAA 177 at ¶ 156. Under this same Agreement V, Eschelon also received a $2 per month per access line payment from Qwest for intraLATA toll traffic that terminated to customers served by Eschelon's switch. *Id.* at ¶ 157. This payment was based on Eschelon's allegation that Qwest was not providing Eschelon with reliable information needed to identify and bill for the intraLATA toll calls that terminate to the Eschelon switch. *Id.* at ¶ 158.

Following execution of these agreements, Qwest attempted to obtain yet another confidential agreement with Eschelon that would require the CLEC to destroy any audit data it possessed relating to Qwest's underreporting of switched access data for inter- and intraLATA toll traffic terminating on the Eschelon network. JAA 201-02 at ¶ 364. Part of Qwest's proposed deal would have required Eschelon to refrain from participating in *any* regulatory proceeding where

[5] "UNE-P" refers to the combination by an ILEC of the unbundled network elements (UNEs) necessary to allow a CLEC to provide local service without the need for additional facilities.

Qwest's interests may be implicated, unless Qwest asked Eschlelon to participate by filing supporting testimony, pleadings, or comments approved by Qwest. JAA 202 at ¶ 365. While this agreement was not executed, Eschelon did covertly aid Qwest by not making its internal report card of unsatisfactory service performance by Qwest available to other carriers, state commissions, or the FCC, and by otherwise assisting Qwest behind the scenes in dockets, such as wholesale service quality proceedings, where Eschelon would otherwise have been considered adverse to Qwest. JAA 203 at ¶ 367.

Provisions contained in the other four unfiled Eschelon/Qwest interconnection agreements included terms establishing: reciprocal compensation rates for Internet service provider (ISP) traffic; credits to Eschelon for past termination liability payments made to Qwest; a dedicated Qwest provisioning team to work on-site at Eschelon to help it gain access to Qwest UNEs; a 6-level escalation process for resolving intercarrier disputes, which *started* at the Vice President level where the escalation process for all other CLECs *ended*; expanded discovery rights in any arbitration of an intercarrier dispute; and performance measurements designed to track the level of service Qwest provided to Eschelon. JAA 164 at ¶ 42; JAA 166 at ¶¶ 54, 62; JAA 168 at ¶ 76; JAA 172 at ¶ 116; and JAA 184 at ¶ 214. In return for obtaining some of these terms, Eschelon agreed not to oppose the US WEST/Qwest merger. JAA 201 at ¶ 363.

2. The Unfiled McLeodUSA/Qwest Interconnection Agreements.

In the unfiled McLeodUSA/Qwest agreements, Qwest also agreed to a number of similar unfiled interconnection terms that were competitively advantageous to McLeodUSA. One term, contained in McLeodUSA Agreement III, was initially an oral agreement by Qwest to give McLeodUSA a 6.5% to 10% discount on all purchases from Qwest so long as McLeodUSA met certain minimum purchase volume commitments, regardless of the type of products or services purchased, or whether the purchases were made inside or outside Qwest's 14-state ILEC territory. JAA 195-96 at ¶¶ 318-19. This discount changed all of the prices in McLeodUSA's interconnection agreement with Qwest, including those set by the Commission in lengthy cost docket proceedings. JAA 195 at ¶ 316; JAA 198 at ¶ 338. When McLeodUSA executives expressed concern that the oral agreement would not be enforceable, Qwest refused to memorialize the discount in writing, and instead entered into a written take-or-pay agreement to purchase products from McLeodUSA. JAA 196 at ¶ 324. This resulted in an 8% discount factor being applied to the projected amount of purchases by McLeodUSA, and was thus merely a mechanism for McLeodUSA to secure a minimum discount of 8%. *See id.* at ¶¶ 324-25. In return for the discount, McLeodUSA agreed to remain neutral regarding Qwest's Section 271 applications. JAA 201 at ¶ 362.

Qwest also entered into an unfiled confidential billing agreement with McLeodUSA that provided for prospective application of all final state commission orders setting rates, with neither party billing the other for any true-ups associated with final orders changing interim prices. JAA 192 at ¶ 286. Qwest entered into another unfiled agreement that provided McLeodUSA with the same 6-level escalation process that Eschelon had obtained. JAA 193 at ¶ 296; JAA 194 at ¶ 308; JAA 195 at ¶ 314. In return, McLeodUSA agreed to withdraw its opposition to the Qwest/US WEST merger. JAA 201 at ¶ 363.

3. The Unfiled Covad/Qwest Interconnection Agreement.

In the unfiled Covad/Qwest agreements, Qwest entered into an unfiled interconnection agreement that required Qwest to meet certain competitively advantageous provisioning guidelines for the CLEC. These included Qwest providing firm order confirmation dates and facility shortage notices for certain services within specified time limits; delivering loops within specified time limits; reducing the incidence of new circuit failures to certain levels; and completing line conditioning at certain prices within specified time limits. JAA 186 at ¶ 235; JAA 187 at ¶ 243; JAA 188 at ¶ 251; and JAA 189 at ¶ 259. In return, Covad agreed to withdraw its opposition to the Qwest/US WEST merger. JAA 201 at ¶ 363.

4. The Unfiled Small CLEC/Qwest Interconnection Agreement.

Qwest also entered into a single unfiled interconnection agreement that secured for the Small CLECs confidential opt-in privileges to voluntarily negotiated and adopted Qwest/CLEC interconnection agreements in other states. JAA 190 at ¶ 274. As a result the Small CLECs, unlike other CLECs, did not have to waste resources negotiating with Qwest for terms that they could opt into through the agreement. Moreover, having advance knowledge of the opt-in provision gave the Small CLECs long-range planning options that other CLECs did not have. JAA 191 at ¶ 277. In return, the Small CLECs agreed to withdraw their opposition to the Qwest/US WEST merger. JAA 201 at ¶ 363. Qwest also filed a settlement document with the Commission that did not include this particular interconnection term so that the Commission would not be aware of its existence. JAA 191 at ¶¶ 275-76.

5. The Unfiled USLink/Qwest Interconnection Agreement.

Qwest entered into one interconnection agreement with USLink that it failed to file. The agreement involved Qwest providing tandem-switching functionality for certain end offices in USLink's service area. JAA 199 at ¶ 350.

C. The ALJ Found Qwest Knowingly and Intentionally Failed to File Interconnection Agreements as Required by the Act, and By Doing So Knowingly and Intentionally Discriminated Against CLECs.

For each of the 26 interconnection provisions contained in the 12 unfiled agreements, the ALJ specifically found that Qwest knowingly and intentionally failed to file the interconnection provisions as required by Sections 252(a) and (e) of the Act, and that each Qwest failure to file was a knowing and intentional act of discrimination in violation of Section 251 of the Act. JAA 165-99 at ¶¶ 45-46; 58-59; 65-67; 75-77; 86-88; 103-105; 114-116; 138-140; 148-150; 165-67; 184-187; 196-98; 205-207; 213-15; 221-23; 229-231; 240-242; 248-50; 264-266; 281-282; 256-258; 290-291; 302-04; 311-313; 342-44; 353-54. These findings included a determination that the 26 provisions were not in any approved interconnection agreements that alerted other, non-party CLECs that the provisions were available for adoption. *See id*.

Before reaching these conclusions, the ALJ reviewed extensive evidence regarding what constitutes an interconnection agreement that must be filed under the Act. JAA 156-62 at ¶¶ 10-29. Upon examining the rulings of the Commission, other state commissions, and the arguments of the parties, the ALJ concluded that every proposed definition of an interconnection agreement (other than Qwest's) was at core the same, namely, that "any contractual agreement or amendment thereto, whether negotiated or arbitrated, between an ILEC and another telecommunications carrier, that concerns the rates, terms or conditions for provision of interconnection, services, or network elements" is an interconnection agreement subject to the filing requirements of the Act. JAA 162 at ¶¶ 28-29. The ALJ further noted that while Qwest argued the definition of an interconnection agreement should be limited to "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement," Qwest's own Statement of Generally Available Terms (SGAT) for CLEC interconnection in Minnesota provided a definition similar to the one articulated by the ALJ.[6] JAA 161 at ¶¶ 23-24; JAA 162 at ¶ 28. The ALJ also noted that Qwest was well aware of the types of agreements that needed to be filed, having been a party to various dockets where the Commission had ruled on whether certain ILEC/CLEC agreements were interconnection agreements subject to the filing requirement. JAA 157-59 at ¶¶ 13-17.

Pursuant to a petition by Qwest during the pendency of this proceeding, the FCC also ruled on the scope of the Act's filing requirements for an interconnection agreement. *See* Qwest Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1) at JAA 310. The FCC reached the same conclusion as the ALJ, finding that:

> an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or

[6] A SGAT is essentially an interconnection agreement template that ILECs such as Qwest hold out to CLECs as a standard offer of interconnection terms under the Act.

> collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).

JAA 313 at ¶ 8.

D. The ALJ Made Detailed Findings Relative To The Factors That Must Be Considered In Imposing Penalties Under Minn. Stat. § 237.462.

At the conclusion of his findings, the ALJ noted that any penalties imposed by the Commission under Minn. Stat. § 237.462 for knowing and intentional violations of the Act and Minnesota's anti-discrimination laws must be based on the nine factors contained in the statute. JAA 203 at ¶ 368. The ALJ then proceeded to summarize all of the evidence relevant to those factors to give the Commission "a full view of the considerations listed in the statute." JAA 203-05 at ¶¶ 368-383.

The ALJ's summary detailed: (1) the willfulness of Qwest's violations (JAA 204 at ¶ 373); (2) the gravity of the violations, including the financial harm to CLECs[7] (*id.* at ¶¶ 374-76); (3) Qwest's history of past violations, including the Commission's recent finding that Qwest had engaged in intentional anti-

[7] By giving lower prices on products and services to some CLECs but not others, Qwest saved itself millions of dollars while causing CLECs without the lower prices to lose millions. JAA 203-04 at 372, 374. One competitor, Popp Communications, became so alarmed at the amount of business it was losing because it could not provide the same service and pricing as Eschelon or McLeodUSA, that it actually confronted Qwest about the deals the ILEC had with those two CLECs and asked if it could get the same terms they apparently had. Qwest told Popp that it could not have the same deals as Eschelon and McLeodUSA. JAA 175 at ¶ 142.

competitive behavior against AT&T (*id.* at ¶ 377); (4) the number of Qwest's violations, involving dozens of distinct interconnection terms in a dozen unfiled interconnection agreements (*id.* at ¶ 378); (5) the hundreds of millions of dollars in economic benefit gained by Qwest (JAA 203-04 at ¶¶ 369-72, 379); (6) Qwest's decision not to take any corrective action on the unfiled interconnection provisions until such time as the Commission ordered it to do so (JAA 204 at ¶¶380-81); (7) Qwest's annual revenue of over $20 billion, and its assets of over $74 billion (JAA 205 at ¶ 382); (8) Qwest's ability to easily pay a fine of $40 to $50 million (*id*. at ¶ 383); and (9) other appropriate factors, such as the harm Qwest caused to the regulatory process in Minnesota.[8] As to this last point, the ALJ warned that Qwest's past behavior did not bode well for the future:

> Non-discrimination by ILECs is a bedrock principle of the Act. The filing of interconnection agreements, and the pick and choose requirements of Section 252, give life to that principle. By not filing the 12 agreements discussed above, Qwest knowingly prevented other CLECs from picking and choosing their provisions. *This demonstrates a hostility to the non-discrimination*

[8] Through the use of unfiled volume discounts, Qwest managed to get two of its largest wholesale customers, Eschelon and McLeodUSA, to remain neutral during consideration of Qwest's Section 271 applications by state and federal regulators. JAA 203 at ¶ 369. This secretly purchased neutrality extended to Covad and the Small CLECs in other dockets as well. JAA 201 at ¶ 363. In the end, this meant that Qwest not only prevented its service-related problems from being fully addressed in the 271 docket, but also from being fully addressed in other Minnesota proceedings, including the Qwest/US WEST merger docket and wholesale service quality docket. *Id*.; JAA 202 at ¶ 365; and JAA 203 at ¶ 370.

> *concept that raises serious questions about how Qwest will cooperate with local competition efforts in the future.*

JAA 200 at ¶ 357 (emphasis added). Based on a review of the statutory factors, the ALJ concluded that imposing a monetary penalty was justified under Minn. Stat. § 237.462, and that the statute specifically allowed the Commission to pursue other enforcement actions against Qwest for these same violations in addition to any penalty it imposed. JAA 205 at ¶ 6.

E. The Commission Adopted the ALJ Report in Its Entirety and Ordered a $25.95 Million Fine That Would Be Stayed Upon Qwest Making Retroactive and Prospective Remedial Payments to CLECs.

In an order dated November 1, 2002, the Commission adopted the ALJ report in its entirety, specifically noting that the ALJ had found that a monetary penalty was justified under Minn. Stat. § 237.462, and that the Commission should consider other remedies as well. JAA 208-09. The Commission found not only that Qwest's intentional failure to file the 12 agreements constituted inter-carrier discrimination in violation of the Act, but it also constituted inter-carrier discrimination in violation of state law. JAA 212-13 (citing Minn. Stat. §§ 237.09; 237.121, subd. 5; and 237.60, subd. 3). To determine how best to rectify this harm, the Commission asked the parties to submit proposals on what penalties and other remedies it should order. JAA 212-13.

On February 4, 2004, the Commission met to consider the remedy proposals and comments submitted by over a dozen parties and participants in the docket, including proposals by the Department, Qwest, the Office of the Attorney General, and various CLECS. It issued its order on penalties on February 28, 2003 ("*Penalty Order I"*). JAA 266.

The Commission decided to impose a fine totaling $25.95 million on Qwest. JAA 269. In reaching this decision, the Commission decided not to fine Qwest for each day an individual interconnection term had not been filed, as it could have ordered under Minn. Stat. § 237.462, but rather to fine Qwest for each day an entire agreement had not been filed. JAA 270, n.4. Based on the fact that the Eschelon IV and McLeodUSA III agreements gave those two CLECs alone significant price advantages over their competitors, and thus caused the most serious damage to competition in the state, the Commission fined Qwest $10,000 for each day those agreements were not filed, for a total of $11,650,000. JAA 269-70. The Commission deemed Qwest's failure to file the other 10 agreements to be less egregious and fined Qwest $2,500 per day, for a total of $14,305,000. *Id.* The Commission gave a detailed explanation of the nine statutory factors it considered in imposing the penalty, which incorporated and expanded on the conclusions in the ALJ report the Commission had adopted months earlier. JAA 272-83.

In addition, the Commission ordered Qwest to take a number of corrective actions to minimize the effects of its discriminatory acts. First, Qwest was ordered to make the 26 provisions in the unfiled agreements available to all CLECs in the state.[9] JAA 284. Second, Qwest was ordered to retroactively give CLECs the equivalent of the financial benefits Eschelon and McLeodUSA enjoyed while their secret volume discount agreements were in place. *Id*. This required Qwest to provide a 10% discount on all past Minnesota products and services that a CLEC purchased from Qwest for the period of time that Eschelon and McLeodUSA had enjoyed the discount. JAA 286. It also required Qwest to give CLECs the $2 per line credit that Eschelon received from Qwest under one of its unfiled agreements, and the $13 and $16 credits on UNE-P lines that Eschelon received under another unfiled agreement it had with Qwest. *Id*. Third, Qwest was ordered to prospectively offer CLECs the 10% discount on all purchases for another 24 months from the date of the Commission's order. *Id*. This prospective discount was based primarily on what the Commission considered to be buy-out payments made to Eschelon and McLeodUSA to compensate them for Qwest's cancellation of the volume discount agreements before their expiration date.[10] JAA 284-85. Finally, the Commission ordered that the $25.95 million fine would be stayed upon Qwest complying with the ordered corrective steps. JAA 285.

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[9] Since Qwest terminated nearly all of the secret agreements upon their disclosure, this corrective action has had virtually no practical impact.

[10] Because Eschelon and McLeodUSA had received all these benefits through their secret deals with Qwest, they were excluded from receiving these remedial payments. JAA 270.

F. The Commission Reconsidered Its Order and Directed Qwest to Pay the $25.95 Million Fine and Pay Reduced Remedial Payments to CLECs.

The Commission subsequently re-considered *Penalty Order I* on its own motion. JAA 298. The Commission subsequently issued a modified order on April 30, 2003 ("*Penalty Order II").* In that Order, the Commission required Qwest to give CLECs the 10% volume discount and the $2, $13, and $16 line credits on past purchases from Qwest for only an 18-month period, because that was the amount of time those discount and rebate terms were in effect for Eschelon and McLeodUSA. JAA 298-99. It also clarified how the per line credits would be calculated, limiting the credits consistent with the terms under which Eschelon received these credits. JAA 299.

In addition, the Commission eliminated the prospective 24-month discount. *Id*. This decision flowed from subsequent Eschelon and McLeodUSA filings, which showed that they did not receive buy-out payments from Qwest that compensated them for the discount they lost when Qwest cancelled their volume discount agreements before their expiration date. JAA 299-300. The Commission concluded the record did not support ordering Qwest to provide forward-going discounts to CLECs. JAA 300. In recognition of jurisdictional uncertainties, the Commission also excluded interstate access services from the 10% remedy. *Id*.

The Commission also decided not to stay its $25.95 million fine. JAA 301. The Commission noted that *Penalty Order I* had explained in detail how the

$26 million fine was justified by Qwest's extensive and systematic violations of the federal and state prohibitions against inter-carrier discrimination. *Id*. While stay of the fine made sense in light of the extensive remedial payments Qwest was originally ordered to make, the stay no longer made sense in light of the Commission’s decision on reconsideration to substantially reduce the remedial payments. JAA 302.

While Qwest had moved the Commission to reconsider *Penalty Order I* on other grounds, the Commission declined to do so. It specifically noted that it was not ordering "opt-in remedies" subject to Sections 251 and 252 of the Act, but monetary penalties and remedial payments under Minn. Stat. §§ 237.081 and 237.462. JAA 295-97. The Commission also reviewed and rejected Qwest's various claims that the Act somehow prohibited or limited the remedies ordered. *Id*. at 7. The Commission likewise considered and rejected Qwest's objection that the Commission had used its fining power to impermissibly "coerce" Qwest into making remedial payments to CLECs. The Commission explained that the size of its fine was well justified by the record, and that it plainly had the discretion under the statute to stay or impose the fine in light of any other remedial actions it ordered. JAA 294, n.2.

G. The FCC Has Found That Qwest Knowingly and Intentionally Failed to File Interconnection Agreements in Minnesota In Violation of the Act and Has Levied a $9 Million Fine Against Qwest.

After Qwest filed this action to challenge the Commission's penalty and remedy orders, the FCC completed its own investigation of Qwest's failure to file interconnection agreements in Minnesota and other states. *See* Notice of Apparent Liability for Forfeiture, JAA 317. Based on its investigation, the FCC has made a preliminary determination that Qwest should be held liable for "willfully and repeatedly violating its statutory obligations in section 252(a)(1) of the . . . Act by failing to file 46 interconnection agreements with the Minnesota Public Utilities Commission . . . and Arizona Corporation Commission . . . for approval under section 252." *Id*. at ¶ 1. In reaching this decision, the FCC considered 34 interconnection agreements Qwest failed to timely file in Minnesota, including four of the interconnection agreements at issue in this case. *See* JAA 330 at ¶ 25 and n.81.

The FCC proposed a $9 million forfeiture for "Qwest's disregard for the filing requirements of section 252(a) of the Act and the Commission's orders and the potential anticompetitive effects of Qwest's conduct." JAA 317 at ¶¶ 1-2. The FCC explained that while it could impose a penalty of up to $55 million, it was only proposing a $9 million forfeiture in light of the outstanding state penalties against Qwest in other states, including the $26 million penalty imposed by the MPUC. JAA 341-42 at ¶¶ 49-50. The Chairman of the FCC issued a statement with the agency's decision emphasizing that the agency action "complements" the enforcement action in Minnesota. Statement of Chairman Michael Powell at JAA 351 ("This action sends a clear message, along with the complementary state actions, that violations of the key pro-competitive provisions of the Act will not be tolerated").

H. The District Court Upheld the Commission's Imposition of the $25.95 Million Fine for Qwest's Discriminatory Actions, But Found The Commission Could Not Order the Remedial Payments to CLECS.

Qwest appealed the Commission's orders to the U.S. District Court of Minnesota, the Honorable Ann D. Montgomery presiding, claiming that the fine and remedial payments violated federal and state law. Judge Montgomery found that the Commission's decision to impose a $25.95 million fine was authorized by state law and amply supported by the record. Memorandum Opinion and Order at JAA 8-10. The court further found that the federal Act did not pre-empt the Commission from imposing the fine (JAA 10-13), and that the fine did not violate the excessive fines clause of the US Constitution or the fair notice doctrine (JAA 13-17). The court found, however, that the Commission did not have authority under state law to order Qwest to make remedial payments to all Minnesota CLECs that had been illegally prevented from receiving the same discounts that Qwest chose to secretly provide to a select few Minnesota CLECs. The court reached this conclusion on the theory that Minnesota case law holds that the Commission has no statutory authority to award *any* equitable remedies.

JAA 7-8. The court therefore did not reach the issue of whether the remedial payments violated federal law, as Qwest also claimed. JAA 8, n. 4.

SUMMARY OF ARGUMENT

This Court should reverse the District Court's determination that the Commission is not authorized under state law to order remedial payments to CLECs who received less favorable pricing terms for access to Qwest's unbundled network elements. These payments fit well within the Commission's remedial authority under Minn. Stat. § 237.081 to make just and reasonable orders to address illegal discriminatory conduct by a telephone service provider. Moreover, these payments are not preempted by federal law. As a result, the Commission's remedial payments to CLECs should be affirmed by the Court in all respects.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's interpretation of state law *de novo*, giving no deference to that interpretation. *Webber v. Bobba*, 322 F.3d 1032, 1035 (8th Cir. 2003). When state law is unsettled or unclear on a particular question, the Court is to decide the matter according to how it believes the highest court of that state would resolve the issue. *Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir. 2000). "When that court has not clearly spoken on an issue, [the Court] may consider "relevant state precedent, analogous decisions, considered dicta, . . . and any other reliable data." *David v. Tanksley*, 218 F.3d 928, 930 (8th Cir. 2000) (quoting *Bass v. General Motors Corp.*, 150 F.3d 842, 847 (8th Cir. 1998)).

While a state commission's interpretations of the Act are reviewed *de novo*, all other issues are resolved under the arbitrary and capricious standard. *US WEST Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1052 (9th Cir. 2000). *Accord Southwestern Bell Tel. Co. v. Waller Creek Communications*, 221 F.3d 812, 816 (5th Cir. 2000) (citing, *inter alia*, *GTE South Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir. 1999)). "The arbitrary and capricious standard requires . . . deference to the state commission's decisions; the agency's action will be presumed valid if a reasonable basis exists for its decision." *MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F.Supp.2d 768, 773 (E.D. Mich. 1999) (citing *US WEST Communications, Inc. v. Hix*, 986 F.Supp. 13, 18 (D. Colo. 1997)).

II. THE COMMISSION PROPERLY IMPOSED REMEDIAL PAYMENTS UNDER MINN. STAT. § 237.081.

A. State Statute Authorizes the Remedial Payments Ordered by the Commission.

The Court should determine that the Commission properly ordered remedies under its broad remedial authority pursuant to Minn. Stat. 237.081. In an analogous case involving implied authority, *US West Communications, Inc., v. Garvey*, 1999 U.S. Dist. LEXIS 22042 (Mar. 31, 1999), the District Court for Minnesota recognized the Commission's authority to require payments to CLECs for failure to meet performance standards. It found that authority fairly implied from the Commission's express power "to ensure the provision of high quality telephone services . . ." under Minn. Stat. 237.16, subd. 8. *US West v. Garvey*, JAA 366 at *39-*40. The remedies ordered here, however, are grounded in the Commission's *express* authority under Minn. Stat. § 237.081, subd. 4 to issue any "just and reasonable order" to remedy any "act, omission, [or] practice" that is "in any respect unreasonable, insufficient, or unjustly discriminatory" and to “establish just and reasonable rates and prices.” The District Court's conclusion that this broad authority does not include the power to impose any sort of equitable relief, including the remedial payments ordered by the Commission here, is mistaken. The decision upon which the District Court relied to reach this sweeping conclusion, *In re New Ulm Telecom, Inc.*, 399 N.W.2d 111 (Minn. Ct. App. 1987), does not hold that the Commission cannot award equitable relief. To the contrary, it holds that where a regulated entity commits certain bad acts, the Commission does not have the authority to impose an equitable sanction under Minn. Stat. § 237.081 *unless it finds that the statute has been violated*. Here, of course, there was such a finding, and therefore the Commission could exercise its broad powers to order appropriate remedies.

1. The remedial payments appropriately address Qwest's unlawful discrimination.

Based on a voluminous record, the Commission found that Qwest had knowingly and intentionally violated federal and state laws by (1) failing to file 12 interconnection agreements; and (2) providing certain CLECs with favorable terms for access and interconnection under those unfiled agreements, while denying other CLECs the opportunity to obtain the same benefits. Those benefits included, for two CLECs, a substantial discount on their purchases. One of these two CLECs, Eschelon, also received additional monthly credits from Qwest on many of its thousands of lines. As a result, the rates paid to Qwest by Eschelon and McLeodUSA were substantially less than the rates set by the Commission and paid by all other CLECs in Minnesota.

From this the Commission concluded that Qwest had engaged in unlawfully discriminatory conduct by secretly providing two CLECs with favorable financial terms for access to Qwest's legacy network – the network on which nearly all CLECs depend to provide service to their customers. Those favorable terms provided the two favored CLECs with over $25 million in cost savings through lower rates and credits that their competitors were denied. Transcript of 2/4/03 Comm'n Hearing, JAA 235**.** These cost savings in turn allowed Eschelon and McLeodUSA to charge lower rates than their CLEC competitors, invest more in service to their customers, or both. As the ALJ and Commission found, by limiting these favorable terms to only two CLECs, Qwest's conduct resulted in "damages to

CLECs" that would be "impossible to calculate," but which would amount to "several million dollars for Minnesota alone." JAA 204 at ¶ 374.

No remedy can put the disfavored CLECs in the position they would have been had they received the same discounts as the beneficiaries of Qwest's discrimination. As the testimony of at least one CLEC witness showed, CLECs that did not have the benefit of the favorable pricing provisions lost customers to the two carriers that were actually receiving those benefits. JAA 175. But the retrospective payments ordered by the Commission can at least provide a level of compensation based on the discounts and credits provided the two favored CLECs that benefited substantially from Qwest's unlawful conduct. In this case, the Commission applied its expertise and ordered an appropriate remedy that tracks the measurable benefits Qwest bestowed on two CLECs to the disadvantage of all others. Contrary to Qwest's assertion, no additional proof of damages is required; the Commission found Qwest's secret interconnection agreements with Eschelon and McLeodUSA themselves proved up the level of discount and credits the Commission should order to compensate the harmed CLECs.

2. The remedial payments are within the Commission's authority under Minn. Stat. § 237.081.

The remedy payments ordered by the Commission fit squarely within the Commission's remedial authority under section 237.081, which grants broad authority to issue a just and reasonable order to remedy a telephone company's unreasonable or unjustly discriminatory acts. As that section states:

> *Whenever the commission finds*, after a proceeding under subdivision 2, that . . . (2) *any* rate, toll, tariff, charge, or schedule or any regulation, measurement, *practice, act, or omission* affecting or relating to the production, transmission, delivery, or furnishing of telephone service or any service in connection with telephone service, *is in any respect unreasonable, insufficient, or unjustly discriminatory*, . . . *the commission shall make an order* respecting the . . . act, omission, practice, or service *that is just and reasonable* and, if applicable, *shall establish just and reasonable rates and prices.*

Minn. Stat. § 237.081, subd. 4 (emphasis added). There can be no question this broad remedial authority encompasses the remedy payments ordered in this case. As the District Court of Minnesota has recognized, an agency's powers include those that may be fairly implied from its express powers. *US West v. Garvey*, JAA 366 at *39 (citing *In the Matter of Northwestern Bell Tel. Co.*, 371 N.W.2d 563, 565 (Minn. Ct. App. 1985), *rev. denied* (Minn. Sept. 26, 1985)); *see also In the Matter of the Application of Minnegasco for Authority to Increase Its Rates for Natural Gas Service,* 565 N.W.2d 706, 711 (Minn. 1997) (finding that "a sensible and fair construction of the statutes" showed the Commission had implied authority to order a recoupment remedy). As the Minnesota Supreme Court has explained, implied authority follows from "the necessity and logic of the situation."

Peoples Natural Gas Co. v. Minnesota Pub. Utils. Comm'n, 369 N.W.2d 530, 534 (Minn. 1985).

The broad mandate under Minn. Stat. § 237.081, subd. 4 to order a "just and reasonable" remedy, which may include "establishing just and reasonable rates and prices," certainly implies the narrower authority to require payments specifically tailored to compensate wholesale customers for the rate differential created by unlawfully discriminatory pricing. The Commission-ordered remedies follow unmistakably from the "necessity and logic of the situation," in which the CLECs entitled to receive these remedial payments were disadvantaged by the discounts and credits that Qwest unlawfully limited to only two of its wholesale customers in Minnesota. The only question in this case is whether the remedies ordered were "just and reasonable" under the circumstances.

That these remedies are just and reasonable is apparent from the relationship between the remedies and the unlawful conduct to which they apply. The remedies require Qwest to pay the victims of its discriminatory conduct the equivalent of the discount and credits that the beneficiaries of Qwest's unlawful conduct received. The two favored CLECs received a 10% discount on all the services and facilities they purchased from Qwest for approximately 18 months from November 2000 to

May 2002. One of these two CLECs also received substantial credit payments based on the number of lines in service.[11]

Accordingly, the Commission's order properly requires Qwest to pay the disfavored CLECs amounts equal to the 10% discount and the per line credits they would have received during that time frame had Qwest acted lawfully and given them the same discounts and credits. The Commission's remedies, therefore, meet any credible test of reasonableness since they were rationally and precisely related to the unlawful conduct at issue and to the financial consequences of that conduct. The 10% discount and line credits gave Eschelon substantial financial advantages over other CLECs and should have been made available to all CLECs pursuant to state and federal nondiscrimination requirements.

The District Court's conclusion that the Commission exceeded its authority in ordering remedial payments was based entirely on the District Court's mistaken interpretation of the *New Ulm Telecom* case. The court interpreted that case to hold that "[Section] 237.081 does not give the MPUC jurisdiction to award equitable relief." JAA 8. But that is not what *New Ulm Telecom* holds.

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[11] The Eschelon IV Agreement provided Eschelon with a $13 pro rata credit on all of its UNE-P lines for each month in which Qwest "fails to provide accurate daily usage information." The Eschelon V Agreement increased this UNE-P credit to $16 per line and added a $2 credit on all UNE lines (as opposed to just UNE-P lines) "until the Parties agree that the issue [involving access records for Qwest's intraLATA toll traffic] is resolved." JAA 88.

Contrary to the District Court’s interpretation, *New Ulm Telecom* simply upheld the Commission’s own view that it could not use the theory of equitable estoppel to impose a particular sanction, license revocation, without a predicate finding of a statutory violation to support that sanction. Specifically, the case involved the Commission's determination that despite misrepresentations made by Qwest's predecessor, Northwestern Bell, that prejudiced the operations of another telephone company, the Commission did not have the authority to revoke Northwestern Bell’s legal authority to provide toll service as a sanction for the misrepresentations absent a finding that Bell was providing inadequate service in violation of Section 237.16, subd. 5. *New Ulm Telecom*, 399 N.W.2d at 117. Unremarkably, the Court of Appeals agreed with the Commission on the need for such a predicate finding to support such a sanction. *Id*. at 122.

Unlike the situation in *New Ulm Telecom,* the Commission in this proceeding found repeated instances of intentional and knowing violations of the anti-discrimination provisions of Minn. Stat. Ch. 237, including Section 237.081, as a predicate for the remedies it ordered. Also unlike the situation in *New Ulm Telecom*, this proceeding involved the exercise of the Commission's authority under Section 237.081 to order remedial payments and establish just and reasonable rates in direct response to unlawfully discriminatory rate discounts and credits, not the Commission’s authority to invoke the doctrine of equitable estoppel to revoke a carrier's license of operation under Section 237.081 rather than Section 237.16. *New Ulm Telephone* is simply inapposite to this proceeding in which the issue is whether the Commission may order remedial payments to a party harmed by another's action *after it has determined those actions are unjustly discriminatory in violation of Section 237.081*. Having found that Qwest intentionally violated state nondiscrimination laws by providing secret deals with substantially discounted rates, the Commission clearly had authority under Section 237.081 to order remedial payments tied specifically to the rate disparity created by Qwest's unlawful conduct.

Looking past its erroneous interpretation of *New Ulm Telecom* decision, the District Court's conclusion regarding the Commission's authority to order the remedial payments at issue here does not hold up under a fair reading of Minnesota Supreme Court precedent. *See Kellogg Co.*, 205 F.3d at 1082 (federal court is bound to resolve ambiguity in state law consistent with how the state supreme court would resolve the same issue). The Minnesota Supreme Court has recognized the Commission's implied authority to order retrospective relief of the sort ordered here under very general statutory grants of remedial authority, absent language limiting that authority to prospective relief. In *Application of Minnegasco*, the Supreme Court found retroactive recoupment authority implicit in the language of Minn. Stat. § 216B.27, which does nothing more than authorize the

Commission generally to "determine the reasonableness of the rates, fares, charges, and classification on the merits." *Application of Minnegasco*, 565 N.W.2d at 711. The Supreme Court concluded that the language of the statute fairly implies the authority to order retrospective relief because it "does not clearly limit the force of Commission orders to solely prospective effect." *Id*. And the relief granted in *Minnegasco* was held long ago by the Minnesota Supreme Court to be "equitable" in nature. *See Abrahamson v. Lamberson*, 75 N.W.2d 226, 228 (Minn. 1898) (recoupment is an equitable remedy). Thus there is no basis for the District Court to conclude that Minnesota case law "holds" that the Commission's authority does not extend to providing *any* equitable relief upon finding a violation of law. *See* JAA 7-8.

The statute on which the Commission relies in this case actually goes further than section 216B.27, authorizing any remedial order "that is just and reasonable" to address a "practice, act, or omission . . . [that] is in any respect unreasonable, insufficient, or unjustly discriminatory . . ." Minn. Stat. §237.081, subd. 4. This is in addition to the Commission's authority to "establish just and reasonable rates and prices." *Id.* And since the Minnesota Supreme Court has not addressed the scope of authority granted by this language, the District Court had a duty to consider "analogous decisions, considered dicta, . . . and any other reliable data." *Tanksley*, 218 F.3d at 930. In an unpublished opinion, the Minnesota Court of

Appeals has specifically found that the language of Section 237.081 does not limit the Commission's authority solely to awarding prospective relief, as Qwest argued below. *See In the Matter of the Members of the MIPA Against US West Communications, Inc.*, 1997 WL 793132 (Minn. Ct. App. Dec. 30, 1997).[12] Specifically relying on *Application of Minnegasco*, the Court of Appeals recognized the Commission's implied authority to order refund payments under Minn. Stat. §237.081. JAA 386. The court also expressly deferred to the Commission's choice of such a remedy based on the agency's expertise, observing that "telephone regulation is a technical area, so this court will defer to the agency's expertise in determining an appropriate remedy." *Id.* (citing *Peoples*, 369 N.W.2d at 535 ("[p]ublic regulation of utilities is an intricate, ongoing process)). *See also Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (agency decisions "enjoy an a presumption of correctness, and deference should be shown

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[12] This unpublished opinion of the Court of Appeals is cited in accordance with Minn. Stat. § 480A.08, subd. 3(c)(5). A copy of this case is included in Joint Appellants' Appendix at JAA 384. The District Court gave no consideration to this case because of the Minnesota Supreme Court's caution that unpublished court of appeals opinions are not precedential and therefore should not be relied on. JAA 7, n.3 (citing *Vhalos v. R&I Constr. of Bloomington*, 676 N.W.2d 672, 676 n.3 (Minn. 2003)). But since the Minnesota Court of Appeals is an error-correcting court charged with applying the law as elucidated by the Minnesota Supreme Court, and *MIPA* is the only case that analyzes the language of Section 237.081 in light of the Minnesota Supreme Court's holding in *Application of Minnegasco*, the District Court clearly erred in failing to consider whether the opinion provided "any reliable data" on how the Minnesota Supreme Court would interpret the language of Section 237.081. *Tanksley*, 218 F.3d at 930.

by the courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience").

Based on the express authority given to the Commission under Section 237.081 to address illegal discrimination in the provision of telephone service, and the recent rulings of the Minnesota appellate courts regarding the Commission's implied authority to order payments in the exercise of its remedial responsibilities discussed above, this Court should reverse the District Court and affirm the payments ordered by the Commission as an authorized and appropriate remedy under state law for Qwest's unlawful conduct.

B. The Commission's Order for Remedial Payments Is Not Preempted by Federal Law

Qwest argued below that the Commission's decision conflicts with the Act and is, therefore, preempted. While the District Court did not reach this issue, it must be resolved upon finding that the Commission's remedies are authorized under state law. Generally, federal appellate courts will not consider issues not decided by the district court. *Sanders v. Clemco Industries*, 823 F.2d 214, 217 (8th Cir. 1986). But the courts have discretion to do so. *Id*. This Court has done so where the proper resolution is beyond any doubt, or where there is a purely legal issue in which additional evidence is not necessary. *Cf id*. (remanding statute of limitations issue back to district court where there was an insufficient factual record to resolve the issue on appeal); *Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th

Cir. 2000) (resolving standing issue not reached by district court because it was a purely legal issue where no additional evidence would affect the outcome). *Travis v. Anthes Imperial Limited*, 473 F.2d 515, 529 (8^{th} Cir. 1973) (resolving personal jurisdiction issue not reached by district court where factual record was sufficient to make determination and issue had been thoroughly briefed and argued). In the event that the Court agrees that the remedial payments to CLECs are authorized under state law, Appellant CLECs ask this Court to rule on Qwest's preemption claim, rather than remanding this case back to the District Court to resolve that one issue. No further evidence needs to be developed on this purely legal claim, and resolving it on appeal would result in the fast and efficient resolution of all the issues in this case.

Contrary to Qwest's claim, the remedies do not conflict with the federal Act. The courts have made clear that conflict preemption exists only to the extent a state requirement contradicts a federal law or frustrates "the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.,* 529 U.S. 861, 873 (2000). This court has been even more clear, concluding that preemption exists only "where it is 'impossible for a private party to comply with both state and federal requirements' or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objects of Congress." *Nordgren v. Burlington*

N. R.R., 101 F.3d. 1246, 1248 (8th Cir. 1996) (quoting *Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995)).

1. The remedial payments relate specifically to Qwest's unlawfully discriminatory conduct and are consistent with the nondiscrimination requirements and purpose of the Act.

The remedies ordered by the Commission neither contradict provisions of the Act nor frustrate the ends of Congress. Rather, the remedies comport with and complement the requirements of the Act. As the ALJ and Commission found, "non-discrimination by ILECs is a bedrock principle of the Act." JAA 200 at ¶ 357. In this case, the Commission ordered remedial payments for conduct that violated state nondiscrimination laws. As remedies designed to enforce state nondiscrimination provisions related to telecommunications services, these remedies clearly further the bedrock nondiscrimination principle of the Act. In fact, the nondiscrimination mandates underlying the Commission's remedies track nearly identically with the federal nondiscrimination requirements in Section 251 of the Act. Therefore, requiring compensatory payments to CLECs as a remedy for violating state nondiscrimination laws can hardly be said to contradict or frustrate the purposes of the Act.

Qwest's preemption argument regarding these remedy payments ultimately rests on the absurd premise that the remedy violates or eliminates the opt-in requirements established in Section 252(i). The absurdity of this premise arises from the fact that it was Qwest that eliminated a CLEC's ability to meet the opt-in requirements by intentionally and unlawfully failing to file its secret agreements. Qwest cannot now seek refuge in the requirements that it rendered inoperable through its unlawful conduct.

More fundamentally, the Commission remedies do not turn on the opt-in requirement under section 252(i). The Commission made clear that it ordered these remedies based on Qwest's unlawful discrimination under state law, not on Qwest's violation of section 252(i). The FCC is also well aware that the Commission has imposed these remedial payments pursuant to state law and has raised no concerns that they violate the Act. Indeed, the FCC has stated that it reduced its own forfeiture penalty on Qwest in light of the remedy orders by the MPUC and other state commissions. JAA 342 at ¶ 50; JAA 351.

2. The remedial payments do not violate the pick and choose provision of Section 252(i) of the Act.

Qwest claimed below that the Commission's remedies violate section 252(i) because there is no showing that the CLECs being compensated could have met the other terms, including volume commitments, that were ostensibly associated with the price discounts and credits in the secret agreements. But whether a CLEC could have opted into the favorable pricing provisions of the secret agreements is beside the point. Qwest's unlawful failure to file deprived CLECs of that chance and it is Qwest's unlawful discrimination and the harm resulting there from, not Qwest's violation of section 252(i), that the Commission's remedies address.

In any event, even if section 252(i) were relevant here, it would not preempt the remedies. To the contrary, section 252(i) would have allowed CLECs to opt into the favorable pricing provisions without the volume commitments or other ostensibly related terms. As interpreted by the FCC at the time of Qwest's unlawful acts and the Commission's remedy decision, Section 252(i) allowed CLECs to "pick and choose" specific portions of an ILEC's interconnection agreement. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 F.C.C.R. 15499, ¶ 1310 (1996) ("*First Report and Order").*[13] As the FCC has observed, "failure to make select portions of an agreement available [under section 252(i)] on an unbundled basis could encourage an incumbent LEC to insert into its agreements onerous terms for a service or element . . . in order to discourage subsequent carriers from making a request under that agreement." *Id.* at ¶ 1312. Therefore, a CLEC could choose to opt into only those portions of an agreement it desired, unless the ILEC demonstrates to the relevant state commission that other terms in the agreement are "legitimately related" to the desired provisions. *Id.* at 1315.

13 This interpretation, allowing carriers to pick and choose select portions of an interconnection agreement, was affirmed by the United States Supreme Court in *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 396 (1999).

Qwest's section 252(i) argument casually skirts the fact that it is the ILEC, under the FCC's pick and choose rule, that bears the burden of proving to a state commission what, if any, additional terms in an agreement are legitimately related to the provisions sought by the CLEC. *First Report and Order* at ¶ 1315. In other words, the onus is on the ILEC to prove that a CLEC should not be allowed to pick and choose only certain select provisions of an interconnection agreement. Qwest has not met or even attempted to meet that burden.

Had Qwest properly filed its secret agreements, CLECs would have had the opportunity to pick and choose only the pricing provisions of those agreements. Qwest could not have required CLECs to accept any of the other terms along with the pricing provisions without first proving that the peripheral terms, including volume commitments, were *legitimately* related to the price discounts and credits. Having failed to file the agreements in the first place, Qwest never established in the context of section 252(i) that the peripheral terms of its secret agreements were legitimately related to the favorable pricing terms. And Qwest has made no such showing in this case.

In fact, Qwest could not make such a showing. The record demonstrates that the terms Qwest asserts as a shield against liability bore no legitimate relationship to the favorable pricing terms of the secret deals. Instead, those terms were merely part of Qwest's subterfuge, intended to conceal or wall-off the preferable pricing terms of its secret agreements from other carriers. As the ALJ and MPUC found, the "consulting services" term in the Eschelon agreement "was a sham designed to conceal the discount." JAA 173 at ¶ 126.

That the volume commitments were also a sham is apparent from the fact that Qwest accepted a $150 million volume commitment from Eschelon in return for a flat 10% discount, while ostensibly requiring the substantially greater volume commitment of $480 million from McLeodUSA for a lower variable discount of 8%-10%. *Compare* JAA 80 at ¶ 2 *with* JAA 204 at ¶ 379. It is obvious that the volume of purchases had no analytical relationship to the discount, but was merely recited in the secret agreements to discourage other carriers from obtaining the pricing preferences that Qwest wanted to limit to the two CLECs from whom Qwest needed help to secure regulatory approval to enter the lucrative interLATA long distance market.[14]

Qwest's deliberate decision to conceal the Eschelon/Qwest and McLeodUSA/Qwest agreements and avoid the pick and choose requirements of Section 252(i), demonstrates that Qwest itself had little confidence in its ability to legitimately tie its volume commitments and other peripheral terms to the price

[14] Qwest claimed below that the Commission acknowledged that the discount provisions were related to the volume purchase commitments. The Commission's statements on this point were not an acknowledgement that the relationship was "legitimate," however, which is the touchtone of the pick and choose analysis under section 252(i).

discounts and credits. Qwest underscored this obvious conclusion when it rejected one CLEC's attempt to discuss and obtain what Eschelon and McLeodUSA had received. JAA 175 at ¶ 142. Rather than invoke the volume commitments and other peripheral terms in response to the CLEC's overtures, Qwest simply refused to discuss or negotiate any such terms. *Id*. From the beginning, Qwest was focused on keeping the favorable pricing terms from others, not on developing a cohesive set of rationally related provisions. For example, when McLeodUSA's negotiator insisted on reducing the 10% discount agreement to writing, Qwest refused out of concern that "other CLECs might feel entitled to the same discount if the agreement were written and made public." JAA 196 at ¶ 323. *See also* Deposition of Blake Fisher at JAA 117-18. Qwest then concocted a take-or-pay commitment to purchase "products" from McLeodUSA, which was calculated by applying an 8% discount factor to McLeod's projected purchases from Qwest. JAA196 at ¶ 324. As the ALJ and Commission rightly concluded, this was merely a mechanism for disguising the minimum 8% discount that Qwest ended up giving McLeodUSA. *Id*. at ¶ 325.

Obviously, these volume commitments and other terms were mere contrivances, not serious terms legitimately related to the substantive price provisions of the secret agreements. This is precisely the type of conduct that gave rise to the FCC decision to allow CLECs to pick and choose preferred portions of agreements under Section 252(i), and place the burden on the ILEC to prove any claim that other terms must also be accepted as legitimately related to the preferred terms.

The claim that section 252(i) bars the remedies ordered by the Commission is baseless. The record shows that Qwest harmed the entire competitive and regulatory scheme by giving certain CLECs favorable pricing terms and unlawfully concealing those favorable terms in return for commitments by the favored CLECs not to participate in or share information related to certain regulatory proceedings. These favorable terms effectively provided two wholesale customers with unlawfully advantageous rates that were well below the rates established by the Commission and charged by Qwest to all other wholesale customers. The Commission's remedies properly seek to provide compensation for the harm resulting from this unlawful discrimination.

C. The Commission Properly Ordered Remedial Payments for So-Called Non-Section 251 Services.

As discussed earlier, the secret agreements allowed Eschelon and McLeodUSA to receive a 10% discount on all the products and services they purchased from Qwest for a period of at least 18 months. Accordingly, the Commission properly directed Qwest to pay remedies equivalent to this 10% discount on all intrastate products and services the disfavored CLECs purchased from Qwest during the same 18-month period.[15] The remedies, therefore, will apply to state tariffed items such as intrastate switched access and private line services.

These intrastate services are not among the items that an ILEC must include in an interconnection agreement with a CLEC under Section 251. 47 U.S.C. 251(b) and (c). Based on this, Qwest asserted below that it never had any obligation to file these terms or make them available for other CLECs to pick and choose under Section 252(i). Thus, according to Qwest, the Act preempts remedy payments with respect to these services. Qwest also argued that the filed rate doctrine bars the Commission remedies as applied to these non-Section 251 items. These arguments are completely without merit and should be rejected.

1. The Act does not preempt application of the remedial payments to non-Section 251 services.

Section 252(i) is irrelevant to the Commission-mandated remedies, which were ordered to address Qwest's deliberate discrimination in favor of two CLECs in violation of both state and federal nondiscrimination laws. Yet even if relevant, the FCC has already addressed and rejected the claim that a non-Section 251 item in an interconnection agreement is not subject to the pick and choose rule in

[15] The Commission excluded interstate services from the remedies for jurisdictional reasons, even though the Eschelon and McLeodUSA agreements did not exclude such services from the discount.

Section 252(i). *See In the Matter of Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia*, CC Docket No. 99-198, Memorandum Opinion and Order ("*Global NAPs*"), 15 F.C.C.R. 23318 (rel. Aug. 5, 1999). In *Global NAPs*, the FCC found that an interconnection agreement may include terms outside the ambit of Section 251, and if it does those non-Section 251 services are subject to pick and choose under Section 252(i).

Global NAPs, a CLEC, was in the midst of interconnection negotiations with an ILEC, Bell-Atlantic, when it determined it could meet its interconnection needs by opting into the terms of an agreement that Bell-Atlantic already had with another CLEC. *Global NAPs*, 15 F.C.C.R. at 23321-22, ¶ 7. Bell-Atlantic refused to allow Global NAPs to opt into the whole agreement, however, claiming the CLEC had no right to the agreement's reciprocal compensation terms because Section 252(i) only permitted carriers to opt into those provisions that were required under Section 251 and reciprocal compensation obligations arose under Section 252. *Id*. at ¶ 7, n.25. The FCC dismissed the claim, noting that a CLECs' right to opt into an interconnection agreement is only limited by the ILEC showing that the term is below cost or not technically feasible to provide.[16] *Id*. (citing 47 C.F.R. 51.809).

Thus once an ILEC includes such terms in an agreement, it must file the agreement and make the non-Section 251 terms available with all other terms to requesting CLECs under Section 252(i). In this case, Qwest's secret agreement with Eschelon included a discount in "an amount that is ten percent (10%) of the aggregate billed charges for *all* purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005." JAA 81 at ¶ 3 (emphasis added.). Similarly, Qwest's agreement with McLeodUSA provided reduced rates "for UNEs, wholesale telecommunications services, interconnection services, tariffed services, retail services, access charges and every other product and service purchased by McLeodUSA from Qwest." JAA 197 at ¶ 333.

There is, therefore, no question that once Qwest agreed to provide a discount on *all* purchases in its Eschelon and McLeodUSA interconnection agreements, including non-Section 251 services, that discount was a term that had to be filed and made available for pick and choose by all CLECs. The same is true of the $2, $13, and $16 per line credits in the Eschelon interconnection agreements that

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16 In fact, once carriers choose to bring a non-Section 251 item into their interconnection negotiations, that item is subject to Section 252's compulsory arbitration requirements if the parties cannot reach agreement on the item. *Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 486-88 (5^{th} Cir. 2003).

Qwest now claims fall outside of Section 251. Had Qwest filed its secret agreements with the Commission as required by law, all of the discount and credit terms would have been available to other CLECs under Section 252(i). By selectively conferring these benefits on only one or two CLECs, Qwest violated both state and federal nondiscrimination laws, as well as Section 252(i), and the Commission's remedies are appropriately tailored to rectify those violations.

2. The filed rate doctrine does not bar the remedial payments as applied to non-Section 251 services.

The filed rate or tariff doctrine does not alter this conclusion. That doctrine provides that once the terms and conditions of a carrier's service are set forth in a duly filed and approved tariff, the carrier may not deviate from the tariffed terms even if it has entered into a contract with a customer to provide service under different terms. *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (the filed rate doctrine prohibits the carrier from deviating from its tariff "[no] matter how eager both the carrier and its customers are to strike a special, off-tariff deal"). The purpose of the filed tariff doctrine is to prevent the utility or carrier from discriminating in price or service among its customers. *Id.* at 487. *See also American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("It is that antidiscriminatory policy which lies at the 'heart of the common-carrier section of the Communications Act'"). But as every case cited by Qwest below demonstrates, this century-old doctrine prohibits federal and state law actions challenging rates that *can only be established by tariff*. *See Evanns v. AT&T Corp.*, 229 F.3d 837, 840 & n.8, n.9, n.10, n.11 (9th Cir. 2000) (citing every case relied upon by Qwest in its explanation that the filed tariff doctrine applies where the federal communications act requires a carrier 1) to establish terms of service via tariff, and 2) not to provide any terms of service except as specified in the tariff). The filed rate doctrine has no application here, where the terms of service in question can be established by an interconnection agreement and made available after Commission review to other CLECs. In this case, Qwest failed to file the interconnection agreements and secure Commission approval as required. This prevented the Commission from making these terms publicly available to other CLECs under Section 252(h) of the Act. Having successfully subverted the anti-discriminatory safeguards built into Sections 251 and 252, Qwest cannot now rely on the filed tariff doctrine as a shield against Commission–ordered remedies designed to rectify the harm caused by that subversion.

In any event, the filed rate doctrine does not purport to limit the regulatory agency with authority over the carrier's rates from exercising that authority to disapprove a tariffed rate that it finds is unreasonable or discriminatory. *See Cahnmann*, 133 F.3d at 487 (the tariffed rate is subject to FCC modification or disapproval); *Evanns*, 229 F.3d at 840 & n.11 (a carrier may not deviate from its tariffed rate "unless it is found by the Commission to be unreasonable"); *Central*

Office, 524 U.S. at 226 (the FCC has authority under Section 202 of the Act to invalidate tariffs on the grounds of discriminatory treatment). In Minnesota, carriers are required to tariff the rates of all their intrastate services. Minn. Stat. §§ 237.07, subd. 1; 237.74, subd. 1. And the Legislature has expressly authorized the Commission to establish a just and reasonable rate when it discovers that the existing rate is "in any respect unreasonable, insufficient, or unjustly discriminatory." Minn. Stat. §§ 237.081, subd. 4. Under *Penalty Order II*, the Commission has, in essence, determined that Qwest's unlawfully preferential rates given to Eschelon and McLeodUSA were unjustly discriminatory during the 18 months that the preferential interconnection rates were in effect. Accordingly, the Court should conclude the Commission has full authority under state law and the filed rate doctrine to abrogate those unlawful rates for that 18-month period through mandatory rate refunds to those customers aggrieved by the discrimination.

CONCLUSION

For the foregoing reasons, the District Court's determination that the Commission lacked authority under state law to order Qwest to make remedial payments to CLECs should be reversed, and the Court should affirm in all respects these remedies ordered by the Commission in response to Qwest's knowing and intentional violations of state and federal law.

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BRIGGS AND MORGAN, P.A.

By__________________________
Mark J. Ayotte (#166315)
Thomas Erik Bailey (#236871)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 977-8670
Facsimile: (612) 977-8650

Attorneys for Intervenor-Appellant AT&T Communications of the Midwest, Inc.

MOSS & BARNETT, P.A.

By______________________________
Dan Lipschultz (#0168440)
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612-347-0306
Facsimile: 612-339-6686

Attorneys for Intervenor-Appellant CLEC Coalition- US Link, Inc., NorthStar Access, LLC, Otter Tail Telcom, LLC, and 702 Communications

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Intervenor-Appellant AT&T Midwest certifies that this Joint Brief of Intervenors-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) in that it contains 11,382 words, excluding Summary of the Case, Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates, and is printed in a proportionately spaced typeface, 14-point Times New Roman, utilizing Microsoft Word 2000.

Dated: December 8, 2004

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Thomas Erik Bailey

CERTIFICATION OF VIRUS-FREE DISKETTE

Pursuant to 8th Cir. R. 28A(d), this certifies that the enclosed computer diskette containing the Joint Brief of Intervenors-Appellants has been scanned for computer viruses and is virus-free.

Dated: December 8, 2004

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Thomas Erik Bailey

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